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What the Sentencing Commission Ought to Be Doing Reducing Mass Incarceration

Lynn Adelman

WHAT THE SENTENCING COMMISSION OUGHT TO BE DOING: REDUCING MASS INCARCERATION

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I. THE OVER-PUNISHMENT PROBLEM AND THE COMMISSION'S INDIFFERENCE TO IT

Beginning in the 1970s, the United States embarked on a shift in its penal policies, tripling the percentage of convicted felons sentenced to confinement and doubling the length of their sentences.[1] This shift included a dramatic increase in the prosecution and incarceration of drug offenders.[2] As a result of its move toward long prison sentences, the United States now incarcerates so many people that it has become an outlier; this is not just among developed democracies, but among all nations, including highly punitive states such as Russia and South Africa,[3] and also in comparison to the United States' own long-standing practices.[4] The present rate of incarceration in the United States is currently "almost five times higher than the historical norm prevailing throughout most of the twentieth century."[5] In sum, the United States has a serious over-punishment problem. Our country's imprisonment rate has acquired the name, "mass incarceration," meant to provoke shame about the fact that the world's wealthiest democracy imprisons so many people, even at a time when

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1. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307 (2009).

2. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 45–48 (2006).

3. Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1208 (2012).

4. Clear & Austin, *supra* note 1, at 307.

5. *Id.*

crime rates have diminished and crime is "not one of the nation's pressing social problems."[6]

Most criminal justice scholars agree that our current prison population is too large.[7] They also agree that the impact of imprisonment on the crime rate is modest and that the speed at which people are released from prison bears little relation to the likelihood that they will remain crime free.[8] Many prisoners can serve shorter sentences without triggering an increase in crime. As a result, we can reduce sentence lengths substantially without adversely affecting public safety.[9]

Federal sentencing policy contributes significantly to the problem of mass incarceration. Every year the federal government sets a new record for the number of people locked up in federal prisons, which now stands at approximately 218,000.[10] Federal prisons are operating 38 percent overcapacity.[11] While the state prison population recently declined for the first time in almost forty years, the federal prison population continues to increase.[12] The unremitting growth of the federal prison population is a direct result of the Sentencing Reform Act ("SRA") of 1984, the United States Sentencing Guidelines ("the guidelines") promulgated pursuant to the SRA by the United States Sentencing Commission ("the Commission"), and statutes imposing mandatory minimum prison sentences for many offenses, particularly drug offenses.

The guidelines were mandatory until the Supreme Court made them advisory in *United States v. Booker.*[13] When the guidelines were mandatory, they caused the average federal sentence to increase from twenty-eight to fifty months.[14] Although the Commission stated that it based the guidelines on past sentencing practice, its methodology immediately tilted sentences higher.[15] For many offenses, the Commission ignored past practice and, with little or no explanation, established much harsher

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6. Weisberg, *supra* note 3, at 1203.

7. Clear & Austin, *supra* note 1, at 307–08.

8. *Id.* at 309–11.

9. *Id.*

10. As of January 17, 2013, the exact figure was 217,937. *See Weekly Population Report*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp/pdf/fy13-bop-bf-justification.pdf (last visited Jan. 21, 2013).

11. DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM: FY 2013 CONGRESSIONAL BUDGET: BUILDINGS AND FACILITIES 1 (2013), *available at* http://www.justice.gov/jmd/2013justification/pdf/fy13-bop-bf-justification.pdf.

12. E. ANN CARSON & WILLIAM J. SABOL, DEP'T OF JUSTICE, PRISONERS IN 2011, at 2 (2012) *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf.

13. 543 U.S. 220 (2005).

14. Lynn Adelman & Jon Deitrich, *Disparity: Not a Reason to Fix* Booker, 18 FED. SENT'G REP. 160, 160 (2006).

15. Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 DRAKE L. REV. 575, 577–78 (2009).

sentences.[16] And in all but a very small percentage of cases, it prohibited courts from sentencing defendants to probation.[17] To the extent that it relied on past sentencing practice, the Commission calculated average pre-guideline sentences by counting only prison sentences, ignoring that "approximately 50 % of defendants in the pre[-]guideline era received sentences of probation."[18] Based on Congress's abolition of parole, another feature of the SRA, and the Commission's choices with respect to the guidelines, the average time served by federal defendants rose from thirteen months to forty-three months.[19] One observer summarized the result of the changes in federal penal policy as follows:

> Changes in sentencing patterns over the past twenty years include a dramatic increase in the length of federal sentences, a monumental shift towards incarceration and away from use of straight probation, a dramatic increase in the size of the federal prison population, and a significant increase in the proportion of drug offenders, especially lower-level drug offenders, in the federal system. This system loves punishment.[20]

Reducing mass incarceration is conceptually simple: We need to send fewer people to prison and for shorter lengths of time.[21] In addition, many prisoners currently serving long sentences are elderly and present little risk to public safety.[22] Establishing an early release program for such prisoners would also contribute to reducing the number of people incarcerated.[23]

A reasonable observer might conclude from the foregoing that the Commission, which has considerable authority with respect to federal sentencing policy, would be making an effort to address the problem of mass incarceration. Such an observer would be surprised to discover not only that the Commission has expressed little interest in the problem, but that it recently asked Congress to enact legislation that would likely result in an increase—not a decrease—in the federal prison population.[24] The Com-

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16. *Id.* at 578.

17. Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 254 (2008).

18. Adelman & Deitrich, *supra* note 15, at 578.

19. Adelman & Deitrich, *supra* note 14, at 160.

20. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1212 (2004).

21. Clear & Austin, *supra* note 1, at 316.

22. ACLU, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY i–ii (2012), *available at* http://www.aclu.org/criminal-law-reform/report-americas-expense-mass-incarceration-elderly.

23. *See id.* at viii.

24. *See Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* U.S. v. Booker: *Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 11 (2011) [hereinafter *Uncertain Justice*] (statement of Patti B. Saris, Chair, U.S. Sentencing Commission).

mission proposed a number of statutory changes all designed to make it more difficult for judges to impose sentences below those called for by the guidelines. Specifically, the Commission asked Congress to require judges to give more weight to the guidelines and to provide additional reasons for imposing sentences that vary substantially from the guidelines.[25] The Commission also asked Congress to require courts of appeals to presume that sentences within the guidelines are reasonable and to scrutinize more carefully sentences based on disagreements with the guidelines.[26]

The Commission justified its proposed changes on the ground that in the wake of *Booker*, it had observed "troubling trends in sentencing, including growing disparities among circuits and districts and demographic disparities."[27] In her statement to Congress, Commission Chair Patti B. Saris made clear that what she meant by "troubling trends" was the fact that judges were too often exercising the discretion that *Booker* conferred on them to grant sentences below guideline sentences. Saris stated that "[o]ver the last three years, average sentence lengths have decreased," and that this was attributable "to a decrease in the rate at which courts are imposing sentences within the applicable guideline range."[28] She asserted, "The most notable change in federal sentencing over time involves the rate of non-government sponsored below range sentences," which increased from 12.5 percent of all cases in the year after *Booker* to "17.8 [percent] of all cases in fiscal year 2010."[29]

It might seem odd that the Commission was more concerned about judges imposing insufficiently harsh sentences than it was about mass incarceration. As I will discuss in Section IV, mass incarceration causes many extremely serious problems, and while the modestly increased rate of below-guideline sentences between 2005 and 2010 is worth noting, it surely falls many rungs beneath mass incarceration in overall importance. Further, while reducing unwarranted disparities is one of the Commission's statutory duties,[30] another is addressing the problem of excessive incarceration. Congress directed the Commission to establish guidelines that minimize the likelihood that the federal prison population will exceed capacity.[31]

However, from a historical perspective, the Commission's proposals were unsurprising. The Commission was doing what it has been doing since Congress created it: attempting to make it as difficult as possible for judges to impose sentences below those called for by the guidelines. Fortu-

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25. *Id.* at 67.

26. *See* Hector L. Ramos-Vega, *Federal Sentencing Then, Federal Sentencing Now: The United States Sentencing Commission's Ill-Advised Efforts to Fix Something That is Not Broken*, FEDERAL LAWYER, May 2012, at 4, 5, 17.

27. *Uncertain Justice*, *supra* note 24, at 12.

28. *Id.* at 33.

29. *Id.* at 34.

30. *See* 28 U.S.C. § 994(f) (2006).

31. *See id.* § 994(g).

nately, the congressional subcommittee to which the Commission offered its proposals seemed singularly uninterested in them. That the Commission advanced the proposals at all, however, raises an important question about the Commission itself. Now that the guidelines are advisory and judges are free to reject them, it is unclear what role the Commission should play, if indeed it serves any significant purpose at all.

In this Article, I attempt to address this question. I argue that the Commission serves no useful purpose by continuing to seek ways of preventing or dissuading judges from imposing below guideline sentences. Rather, I suggest that the Commission ought to strike out in a new direction, one that is responsive to present conditions. The Commission should focus on reducing mass incarceration. The Commission has considerable resources and, if it made a serious and concentrated effort, could significantly ameliorate the problem of mass incarceration. At the same time, the Commission could reduce the number of below guideline sentences. The most effective way to reduce the number of below guideline sentences would be to make the guidelines less severe. If judges were in greater agreement with the guidelines, they would be less inclined to impose sentences beneath them.

This Article proceeds as follows: in Section II, I briefly describe the origins of the SRA, the Commission, and the guidelines. I focus on the SRA's sponsors' concern with inter-judge sentencing disparity which occurs because not all judges impose equally severe sentences. I discuss how this concern and the related effort to curtail judicial sentencing discretion led to a sentencing regime of unredeemed harshness and thereby significantly contributed to mass incarceration. In Section III, I explain why attempting to build a sentencing system based on reducing inter-judge disparity is doomed to fail. In Section IV, I discuss some of the terrible consequences of mass incarceration, particularly in the African American community, and suggest actions that the Commission could take to reduce the over-punishment which causes it. In Section V, I suggest how the Commission might refine its thinking about inter-judge disparity while at the same time working to reduce mass incarceration.

II. THE IDEAS AND POLICIES THAT LED TO OVER-PUNISHMENT

The idea that inter-judge sentencing disparity should be reduced by curtailing judicial discretion has played an enormously important role in federal sentencing policy in the last forty years. Before the SRA was enacted and the guidelines promulgated, federal judges enjoyed broad sentencing discretion.[32] In the 1960s and 1970s, however, a group of legal academics led by Marvin Frankel, a professor of administrative law who had become a district court judge, concluded that judicial discretion

32. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 104 (1998).

should be curtailed because it left too much room for the philosophies of individual judges and led to the unequal treatment of similarly situated defendants.[33]

The reformers did not actually know very much about inter-judge disparity.[34] They argued that such disparity was so great as to be "shameful," but the evidence did not support this claim.[35] At most, there were modest disparities.[36] Nor did the reformers' sentencing egalitarianism go very deep. Disparity in sentencing is caused not only by the fact that judges have different sentencing philosophies but also by other factors, including differing prosecutorial practices and differing regional traditions.[37] The reformers, however, expressed little interest in any source of disparity other than judges. Further, the reformers never persuasively explained why reducing inter-judge disparity was so important that it justified overturning law which had been on the books for many years and generally thought to have worked well.[38] They also ignored the fact that it was virtually inevitable that curtailing judicial discretion would produce much harsher sentences, as a commission chosen by elected officials is highly likely to create severe penalties and because curtailing judicial discretion essentially allows prosecutors to determine sentences based on their charging decisions.[39]

The reformers were undeterred by the absence of evidence of widespread disparity, by the fact that sentencing decisions are often morally difficult and not susceptible to fair resolution by means of a guideline, or by the likelihood of harsher sentences. They took their proposal to Senator Ted Kennedy which, for several reasons, was particularly unfortunate.[40] First, those seeking to improve the criminal justice system should hesitate to take their ideas to Congress. In the United States, crime is a highly politicized issue, and it is hard to pass a bill relating to crime without getting enmeshed in the politics of law and order. The SRA proved to be no exception. Second, Kennedy wanted very badly to be thought of as effective and believed that he could earn this reputation if he could get a lot of bills passed. This made him overly eager to sponsor so-called "reform" bills and to accept harmful amendments to get them passed. Kennedy agreed to sponsor a bill dramatically changing federal sentencing. As the bill

33. *See* Adelman & Deitrich, *supra* note 17, at 240.

34. Kate Stith & Steve Y. Koh, *Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228 n.23 (1993).

35. STITH & CABRANES, *supra* note 32, at 106 (1998) (quoting S. REP. NO. 98–225 (1983)).

36. *Id.* at 106–07.

37. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 200–03 (1991) (noting prosecutorial disparities and regional disparities).

38. STITH & CABRANES, *supra* note 32, at 35–37.

39. *See* JAMES Q. WHITMAN, HARSH JUSTICE 53–56 (2003).

40. Stith & Koh, *supra* note 34, at 232–33.

progressed, he accepted many harmful amendments, including one making the proposed guidelines binding instead of advisory, such that the SRA essentially became another "tough-on-crime" bill.[41] By the time of passage, its most vocal supporter was President Reagan, who touted it as legislation that would "crack down on criminals."[42]

Kennedy's bill also picked up support from legislators with long histories of opposition to civil rights, such as Senator Strom Thurmond of South Carolina and Senator John McClellan of Arkansas.[43] These legislators clearly grasped that curtailing judicial discretion would lead to much harsher sentences.[44] Further, Kennedy's bill provided them with a vehicle to strike out at one of their long-standing targets: the federal judiciary. Southern conservatives had been hostile to federal judges since the 1950s because of racially liberal decisions like *Brown v. Board of Education*,[45] and conservative hostility only increased as the Supreme Court announced criminal law decisions like *Miranda v. Arizona*.[46] And in the anti-disparity rhetoric supplied by the reformers, conservatives found a new and more acceptable, i.e., non-racial, language to express their disapproval of federal judges. Their support for Kennedy's bill, however, had more to do with hostility toward liberal judges than with concerns about sentencing disparity.[47]

A few members of the House such as Representative John Conyers of Michigan questioned the premise of Kennedy's bill, that the exercise of discretion by federal judges had actually caused serious disparity, and that whatever disparity it did cause justified radically curtailing judicial discretion. Conyers pointed out that "justice required 'leaving judges free to tailor sentences to the unique circumstances involved in each case,'" and that guidelines created by an administrative agency "would lead to 'an escalation' of sentences due to 'political pressure.'"[48] Although history has shown that Conyers was exactly right, a powerful alliance that included Reagan, Kennedy, Senate Judiciary Committee Chairman Joe Biden, and most Republican legislators, rejected Conyers's view, and Kennedy's bill became law.[49]

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41. STITH & CABRANES, *supra* note 32, at 41.

42. *Id.* at 46 (citing CONG. Q. 1841 (1984)).

43. *Id.* at 42–43.

44. *Id.* at 39–40.

45. *See* Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from* Brown *to* Booker, 11 ROGER WILLIAMS U. L. REV. 473, 487–88 (2006).

46. *Id.*

47. *See id.* at 490–91.

48. STITH & CABRANES, *supra* note 32, at 45–46 (quoting 130 CONG. REC. 2616 (1984)).

49. *Id.* at 47.

Unsurprisingly, the Commission proceeded to promulgate guidelines establishing very harsh sentences. Although Frankel had expressed hope that the Commission would serve as a bulwark against harshness,[50] this hope was unrealistic and the Commission quickly dashed it. The Commission generally displayed a pro-prosecution bias,[51] and its members viewed the Department of Justice and the most law-and-order members of Congress as their primary political constituency.[52] As judges began to impose the sentences required by the guidelines, the federal prison population began to shoot up. In the pre-guideline era, judges imposed harsh sentences only when they believed them necessary but, under the guidelines, harshness became "a rule of law."[53]

As mentioned, the severity of the guidelines was not based on past sentencing practice. The Commission had only the sketchiest data concerning past practice, and its unexplained decision to eliminate probation sentences skewed the data that it did have.[54] Although most of the guidelines are severe, different guidelines followed different paths to severity. For example, at the time that the Commission was formulating the guidelines, Congress enacted the Anti-Drug Abuse Act of 1986 ("ADAA") which established a three-tiered sentencing structure generally calling for sentences of zero to twenty years, five to forty years, and ten years to life depending on the type and amount of drug.[55] Without explanation, the Commission chose to structure the drug trafficking guideline based on the quantities that the statute set. The result was "increased prison terms far above what had been typical in past practice."[56] On the other hand, the severity of the child pornography guideline developed over time, although, again, Congress contributed to it significantly. Congress issued a series of directives causing the guideline to become particularly harsh. The mean sentence for possession of child pornography increased from thirty-six to 110 months.[57]

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50. Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 672 (1993).

51. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 763–65 (2005).

52. Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713, 717 (1993).

53. Frankel & Orland, *supra* note 50, at 661.

54. U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENT, (1987) 21–22; *see also* Ellen C. Brotman, *Make Probation a Real Option at Sentencing*, 23 FED. SENT'G REP. 257, 258 (2011).

55. Adelman & Deitrich, *supra* note 15, at 582.

56. *Id.* at 583 (quoting U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 49 (2004) [hereinafter FIFTEEN YEAR REPORT]). The time served by federal drug offenders more than doubled following the enactment of the ADAA and the guidelines. FIFTEEN YEAR REPORT at 53.

57. United States v. Hanson, 561 F. Supp. 2d 1004, 1009 (2008) (citing TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES).

With respect to fraud and theft offenses, the Commission treated the amount of loss as a proxy for seriousness. Thus, it created a guideline driven almost completely by the amount of money stolen.[58] Focusing on amount, however, often leads to the unfair oversimplification of complicated facts. And in some white collar cases, such as those involving publicly traded companies, the emphasis on amount causes the guideline range to "run amok."[59] In *United States v. Adelson*, for example, a defendant with no criminal record and a history of good works faced a guideline calling for life imprisonment.[60] Likewise, in *United States v. Parris*, the defendants, first-time offenders, faced a guideline range of 360 months to life based on "the 'kind of piling-on'" of points which is common under the guidelines.[61]

To exacerbate the problem, over the last twenty years, the Commission has continually amended the guidelines to make them more severe. As Professor Bowman put it, the guidelines have been subject to a "one-way upward ratchet, in which sentences are raised easily and often and lowered only rarely and with difficulty."[62] The result is a sentencing regime that Professor Berman recently described as follows:

> Severity is the issue . . . it's severity that is why the federal system right now at this moment in time is so dysfunctional . . . the system has shown an incredible inability to deal with the problem of severity effectively . . . everybody [including the Justice Department] understands that in some of these cases, it's too long . . . we can't go in there and ask for a guideline sentence in front of judges, we'll look foolish. That must be because the guidelines are too severe, and it's foolish to assert in some cases, that the guideline complies with the requirement of 3553(a) to impose a sentence sufficient, but not greater than necessary . . . .[63]

Booker has created the potential to ameliorate the harshness of the guidelines.[64] Yet the guidelines have strong gravitational pull as evidenced by the fact that most sentences remain within or close to the guideline

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58. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2009).

59. United States v. Adelson, 441 F. Supp. 2d 506, 507 (S.D.N.Y. 2006); *see also* United States v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006) ("Under the Guidelines, it may well be that all but the most trivial frauds in publicly traded companies may trigger sentences amounting to life imprisonment . . .").

60. 441 F. Supp. 2d at 509, 513.

61. 57 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (quoting *Adelson*, 441 F. Supp. 2d at 510).

62. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315 (2005).

63. U.S. SENTENCING COMM'N, PUBLIC HEARING (2012) (testimony of Douglas A. Berman at 285–89 (transcript on file with author)).

64. *See* 543 U.S. 220.

range.[65] Judges are cautious by nature, and they pay a lot of attention to the Commission's recommendations even though such attention is often unwarranted. Thus, *Booker* has made a very severe sentencing regime only slightly less severe.

III. THE HARM CAUSED BY THE COMMISSION'S PREOCCUPATION WITH INTER-JUDGE SENTENCING DISPARITY

For a number of reasons, we have or should have learned from twenty-five years of guideline sentencing that too much focus on reducing inter-judge sentencing disparity is a major mistake. We have learned, for example, that disparity is an elusive and complicated concept.[66] No two defendants or offenses are identical, and the number of factors that may appropriately affect a sentence is virtually unlimited, as are the weights that may be properly placed on such factors.[67] Defendants who have committed similar offenses and have similar records may, yet, differ in important ways. We also know that the guidelines frequently fail to capture these differences.[68] The guidelines purport to treat like cases alike, but they achieve this appearance "only by imposing artificial definitions of likeness . . . ."[69] Further, it is often impossible to describe in a guideline how much influence a fact or personal characteristic should have on a sentence.[70] This is the reason that in many kinds of cases, such as drug and theft cases, the Commission placed so much emphasis on quantity. Focusing on the quantity of drugs possessed or money stolen makes guideline writing easier even though the resulting guidelines do not help us impose fair sentences.[71]

We have also learned that binding or presumptively binding guidelines of the sort that the Commission has favored do not reduce certain kinds of disparity. Binding guidelines made it impossible for judges to check prosecutorial power and, thus, led to a huge increase in prosecutor-created disparity.[72] Further, binding guidelines did not reduce racial disparity in sentencing. When the guidelines were mandatory, racial disparity worsened. The Commission's *Fifteen Year Report*, the agency's evaluation

65. *Uncertain Justice*, *supra* note 24, at 12.

66. *See* STITH & CABRANES, *supra* note 32, at 106.

67. *See* Lynn Adelman & Jon Deitrich, *Fulfilling* Booker*'s Promise*, 11 ROGER WILLIAMS U. L. REV. 521, 528–34 (2006) (discussing factors that sentencing judges consider in a post-*Booker* landscape); *see also* R.A. Duff, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162, 1173–81 (2005) (explaining that numerical guidelines fail "to recognize the irreducible diversity of values").

68. Duff, *supra* note 68, at 1173.

69. *Id.*

70. Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005).

71. *Id.* at 93.

72. *Id.* at 87.

of fifteen years of guideline sentencing, discloses that the "gap between White and minority offenders was relatively small in the preguidelines era"; however, "[c]ontrary to what might be expected at the time of guidelines implementation . . . the gap between African-American offenders and other groups began to widen."[73] Disparate treatment by judges accounted for little if any of this disparity. The source of the problem was the guidelines, in particular the career offender and drug guidelines. The *Report* states:

> Today's sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.[74]

In other words, judges were better at treating offenders of different races equally when there were no guidelines.[75]

Furthermore, we know that focusing on reducing inter-judge disparity produces very severe sentences. Although I have noted the guidelines' harshness, one study deserves particular mention.[76] Judge James S. Gwin, a district court judge in the Northern District of Ohio, analyzed twenty-two cases in which juries returned guilty verdicts. In each case, after receiving the verdict, Gwin provided the jurors with the defendant's criminal record and asked each individual juror to recommend the appropriate punishment without discussing the matter with the other jurors.[77] Although the sample was not large, the jurors provided a reasonable indication of American sentiment as Ohio almost perfectly mirrors the United States in age, employment levels, income, racial composition, and political sentiment.[78] The results were dramatic. The sentences called for by the guidelines were far more severe than the sentences the jurors thought defendants should receive.[79] Depending on the case, the sentences specified in the guidelines were three to five times harsher than the punishment the jurors believed appropriate.[80] Thus, in a case where the guidelines recom-

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73. FIFTEEN YEAR REPORT, *supra* note 56, at 115.

74. *Id.* at 135.

75. *See* Lynn Adelman & Jon Deitrich, Rita, *District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 56–58 (2007).

76. *See generally* James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173 (2010).

77. *Id.* at 174.

78. *Id.* at 175 nn.6–7.

79. *Id.* at 175.

80. *Id.* at 173, 187–88.

mended a sentence of eight to nine years in prison, the jurors recommended a sentence in the vicinity of two to four years.

We have also learned that binding guidelines diminish public respect for the judiciary. Frankel argued that curtailing discretion would create confidence in the judicial system.[81] This, however, turned out not to be true. By trivializing judges' powers, the pre-*Booker* guidelines created disrespect for federal sentencing.[82]

We know, too, that defendants and their advocates have little use for the Commission's continuing preoccupation with inter-judge disparity. Frankel argued that curtailing discretion would benefit defendants by decreasing any resentment that they might feel as the result of receiving a sentence that they regarded as overly severe and by giving them notice of the penalties they faced.[83] But no evidence supports Frankel's notion that disparity causes prisoner resentment.[84] And while the guidelines provide defendants with notice, they certainly do not benefit them. In fact, the pre-*Booker* guidelines likely harmed defendants more than anything in the history of federal criminal law.

At a forum on sentencing, Bobby Vassar, Minority Chief Counsel of the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee, explained why defendants' advocates oppose the Commission's focus on disparity. Responding to a statement by Commission Chair Saris that the Commission was concerned about judges treating White defendants better than African Americans, Vassar said that he was suspicious of the Commission's concerns about inter-judge disparity when the only solution it could ever come up with was more severe sentences for all defendants.[85] Defendants do not care about disparity. Rather, they are interested in receiving a sentence that they regard as fair, which usually will be a sentence beneath the guidelines.

Unfortunately, even though the focus on inter-judge disparity has caused great harm, the notion that such disparity is of great significance is very hard to dispel. The Commission and others continue to treat the degree of inter-judge disparity as the key measure of the performance of the federal sentencing system. As former judge Nancy Gertner put it:

> The Guidelines essentially supplanted everything. It was almost as if we could no longer speak about anything else . . . . As one judge in Oregon . . . describes it, "It's as if the only thing we

81. Adelman & Deitrich, *supra* note 17, at 248–49.

82. *Id.* at 250.

83. *Id.* at 249.

84. *Id.*

85. American Constitution Society, The Relevancy & Reach of the U.S. Sentencing Comm'n, YOUTUBE (Jan. 20, 2012), http://www.youtube.com/watch?v=Y4GB98poYL4, at 1:18:56 (comments of Bobby Vassar).

> are talking about is whether I am doing the same thing as Judge Adelman is doing, even if we are both wrong."[86]

Soon after *Booker*, I had an experience that illustrates the same point. I imposed a substantially below-guideline sentence in an unlawful reentry case, emphasizing the excessive severity of the sixteen-level guideline enhancement for reentry into the United States after conviction of an aggravated felony.[87] As a subsidiary point, I noted the disparity in sentences in unlawful reentry cases in districts that had "fast-track" programs and those that did not.[88] Many judges contacted me about the decision, but not a single judge was interested in my critique of the severity of the sixteen-level enhancement.[89] They cared only about the point relating to disparity.[90]

In sum, we have learned or should have learned that, while the notion that it is important to reduce inter-judge disparity is seductive, such importance has been greatly exaggerated. The truth is that paying too much attention to reducing inter-judge disparity leads to very unsatisfactory results. As Professor Stith, coauthor of the most comprehensive study of sentencing under the SRA, concluded: "[I]t is a major mistake to construct a system of guidelines whose primary structural objective is to minimize inter-judge sentencing disparity."[91]

IV. THE TERRIBLE CONSEQUENCES OF MASS INCARCERATION, AND WHAT THE COMMISSION CAN DO ABOUT IT

Given the severity of the guidelines, if the Commission continues on the path it has been on, focusing primarily on inter-judge disparity, it risks becoming entirely irrelevant. A representative of the American Bar Association, James E. Felman, made this point at the Commission's February 16, 2012 hearing:

> The data . . . is . . . startling . . . that roughly one-quarter of all people imprisoned in the entire world are imprisoned here in the United States. . . . [T]he incarceration explosion over the last 40 years in this country is 'unmatched by any other society, in any historical era.' I think that's a remarkable statement. No society in history has done what we're doing now . . . there are more people under correctional supervision in America than

86. Panel Discussion, *Federal Sentencing Under "Advisory Guidelines:" Observations by District Judges*, 75 FORDHAM L. REV. 1, 5, 7 (2006).

87. United States v. Galvez-Barrios, 355 F. Supp. 2d 958, 961–64 (E.D. Wis. 2005).

88. *Id.* at 963.

89. Adelman & Deitrich, *supra* note 17, at 256.

90. *Id.*

91. Panel Remarks, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 447 (2000).

> were in the Gulag Archipelago under Stalin at the height and there are more black men under correctional supervision that there were slaves in 1850.
>
> So to talk about the fact that the . . . rate of variances has changed since Booker from 12.7 percent to 17.2 percent, a 4.5 percent change is - I am just struck that that type of relatively insignificant change, when you consider the change in federal sentence length has been an increase of 300 percent since the guidelines were put into effect. That the percentage of probation - straight probation was between 35 and 40 percent when the guidelines went into effect. It's now down to a little over seven percent. Those are statistics that ought to motivate this Commission to serious action. But to say that a four and a half percent increase in the rate of non-government sponsored variances is an emergency that it calls for a full overhaul of the system . . . it just feels a little more like we're rearranging the deck chairs on the Titanic, as opposed to really addressing the serious issues that confront our country in terms of sentencing policy. . .[92]

To play a useful role, the Commission must address the criminal justice system's main problem: too many prisoners resulting from too many unnecessarily long sentences. The Commission has broad powers, and as discussed, is authorized to address this problem.[93] And as the nation's preeminent agency dealing with sentencing, by addressing it the Commission

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92. U.S. SENTENCING COMM'N, PUBLIC HEARING (2012) (testimony of James E. Felman at 381–83 (transcript on file with author)).

93. *See* 28 U.S.C. § 991(b) (2006).

> The purposes of the United States Sentencing Commission are to – establish sentencing policies and practices for the Federal criminal justice system that – assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Id. While the Commission must reduce unwarranted disparity, it must also ensure that sentences are sufficient but not greater than necessary, 18 U.S.C. § 3553(a) (2006); make sure that the guidelines do not produce more inmates than the prisons can handle, 18 U.S.C. § 994(g); and, when appropriate, re-evaluate its work in light of feedback from participants in the system, including judges.

would set an important example and could have an impact at the state as well as the federal level.

The Commission might begin by exploring some of the voluminous literature on mass incarceration and its damaging effects. Many books and articles have been written on the subject.[94] Of particular importance is Bruce Western's *Punishment and Inequality in America,* because it describes the striking associations between mass incarceration and the problem of increased inequality,[95] which has become so serious that it can be reasonably regarded as a threat to our democracy.[96] We imprison the poor and the uneducated at rates that are distressing even if we ignore race. But once we consider race, the rates are truly horrific.[97] Problematically, the incarcerated population consists disproportionately of minorities. About 44 percent is African American, "more than three times" the 12 percent African American share of the general population, and 19 percent is Hispanic, compared to 12 percent of the general population.[98] Incarceration has an enormously harmful effect on the life prospects of those imprisoned. Released prisoners suffer a 30-40 percent loss of income, their domestic partnerships are often ruptured, and their marriage prospects reduced.[99] They

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94. These include, to mention only a few: SASHA ABRAMSKY, AMERICAN FURIES: CRIME, PUNISHMENT AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT (2007); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011); VANESSA BARKER, POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS (2009); Laurence D. Bobo and Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice & Punishment* in DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY (Hazel Rose Markus and Paula M.L. Moya, eds. 2010); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); Sharon Dolovich, *Creating the Permanent Prisoner* in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. and Austin Sarat, eds. 2012); ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA (2011); DAVID GARLAND, THE CULTURE OF CONTROL, CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); TARA HERIVEL AND PAUL WRIGHT, PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION (2009); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Mark Mauer and Meda Chesney-Linel eds. 2003); MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION (2006); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2009); ANNE MORRISON PIEHL AND BERT USEEM, PRISON STATE: THE CHALLENGE OF MASS INCARCERATION (2008); ANTHONY THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS (2009); WESTERN, *supra* note 2; and JAMES G. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

95. Weisberg, *supra* note 3, at 1206.

96. *See generally* TIMOTHY NOAH, THE GREAT DIVERGENCE (2012).

97. Weisberg, *supra* note 3, at 1206.

98. *Id.* at 1209.

99. *Id.* at 1220–21.

suffer a profound social exclusion making it more likely that they will fall into recidivism and reenter prison.[100]

In addition, mass incarceration divides minority communities as the experience of pervasive imprisonment is confined to those who do not have a college education.[101] Mass incarceration also disrupts inner city neighborhoods and tears apart families living there. According to Western, "By 2000, over a million black children—9 percent of those under eighteen—had a father in prison or jail."[102] Young men grow up thinking prison is a normal part of experience.[103] In short, mass incarceration produces "a new and massive underclass, disproportionately made up of racial minorities."[104] As such, it is a major part of the story of increased inequality.[105] Western challenges any sense of self-congratulation about the success of the civil rights movement and the election of an African American president. He makes clear that mass incarceration, although invisible to many, is a form of residential segregation, and that "the invisibility of today's poor remains rooted in the physical and social distance between white and blacks."[106]

The Commission should proceed to hold public hearings on mass incarceration. It should hold some of these hearings in the country's inner cities so that it can obtain the perspective of those most affected by it. Holding such hearings would also signal that the federal government has an interest in the problem and would create greater awareness of mass incarceration among the many Americans who have not been exposed to it.

In order to reduce the federal prison population, the Commission must also revise the guidelines to make them less severe. A good first step would be to modify the guidelines to make clear that, if the facts of the offense and the defendant's background warrant it, probation is an appropriate sentence. Section 3553(a) of Title 18 requires courts to impose the least restrictive sentence that satisfies the purposes of sentencing. In many cases, this will be a sentence of probation.[107] The guidelines, however, are excessively oriented towards imprisonment and do not make this clear. Further, section 3582(a) of Title 18 directs courts to consider the section 3553(a) factors "in determining whether to impose a term of imprisonment." Reasonably read, this provision means that the first question that a

100. *Id.* at 1221.

101. WESTERN, *supra* note 2, at 30–31.

102. *Id.* at 5.

103. *See id.* at 4–5.

104. Weisberg, *supra* note 3, at 1221.

105. *Id.*

106. *Id.* at 1219 (quoting WESTERN, *supra* note 2).

107. Brotman, *supra* note 54, at 258 (noting pure probation sentences in 1984 were approximately 38 percent of all sentences); *see also* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences*, 101 YALE L.J. 1681, 1706 (1992).

sentencing court must ask is whether to imprison the defendant.[108] This is not, however, the first question that the guidelines ask, nor in most cases, do the guidelines ask it at all. The question that the guidelines ask is what imprisonment range does the defendant fall within.[109] The guidelines treat probation as a footnote—an option available only in an extremely small slice of cases.[110] This approach has contributed to making prison the default sentence under the guidelines. To this day, the number of defendants sentenced to probation without any form of incarceration is miniscule.[111]

The Commission also needs to address the guideline relating to first offenders. In 28 U.S.C. § 994(j), Congress directed the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense."[112] Because of its attachment to prison sentences, the Commission did not implement this provision, but rather, it viewed it as a problem.[113] It responded to the problem by creating "guidelines that classify as serious many offenses for which probation previously was frequently given and provide[d] for at least a short term of imprisonment in such cases."[114] As a result, the "guidelines contain a presumptive sentence of imprisonment for every felony in the *United States Code*."[115] The Commission should reconsider this decision and expand the number of cases in which probation is a guideline approved sentence.

Next, the Commission should systematically reduce the sentencing ranges called for by the guidelines. Although the Commission should examine every guideline, it might begin with those that most frequently result in variances, for these are the guidelines that judges consider most problematically harsh. Even though guideline advocates anticipated that judicial responses would play an important part in guideline revisions, this has not happened.[116] With a few exceptions, no guidelines have ever been

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108. Brotman, *supra* note 54, at 257.

109. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6 (1988).

110. Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 296 & n.29 (1992).

111. Only about 7 percent of all federal defendants are sentenced to probation. *See* Felman, *supra* note 92, at 382.

112. 28 U.S.C. § 994(j) (2006); *see* Brotman, *supra* note 54, at 257.

113. Freed, *supra* note 107, at 1707.

114. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(d) (2012).

115. Freed, *supra* note 107, at 1706.

116. *See* Douglas A. Berman, *Exploring the Theory, Policy and Practice of Fixing Broken Sentencing Guidelines*, 21 FED. SENT'G REP. 182, 183 (2009).

reduced.[117] And as discussed, most guidelines are too harsh.[118] Also, the fact that judges do not vary from some guidelines does not mean that such guidelines establish appropriate sentencing levels.[119] If a guideline is not manifestly excessive, judges will often defer to it. As stated, judges pay a lot of attention to the guidelines, whether or not such attention is deserved.[120]

Reducing the severity of the guidelines would also advance the Commission's goal of reducing inter-judge sentencing disparity. Judges vary from the guidelines because they regard them as too severe.[121] If judges regarded the guidelines as fair, they would follow them more often. In other words, the Commission could achieve its goal of reducing inter-judge disparity by improving the quality of its product, rather than by forcing its consumers, judges, to buy it.

In addition to revising the guidelines, the Commission should also become an advocate for policies that will reduce the prison population. Most importantly, it should argue forcefully for the repeal of mandatory minimum sentences. Many federal defendants face charges carrying mandatory minimums, including some 74 percent of defendants charged with offenses involving crack cocaine.[122] Most of these defendants are small-time, street-level drug dealers for whom the mandated five or ten year sentences are manifestly excessive.[123] The Commission has issued an excellent report on mandatory minimums[124] but has not assumed a leadership role by speaking out and lobbying against them. Possibly, the Commission is reluctant to be political. Some of the most effective state sentencing commissions, however, are those that have taken strong stands and pushed for sensible results in the highly politicized world of criminal justice. Commissions which function like interest groups are often more

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117. *See* David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 223 (2004).

118. *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (2010) (noting in Question 8 that approximately 70 percent of judges thought guidelines for certain offenses were too high).

119. *See id.* at Question 19.

120. *See* Lydia Brashear Tiede, *The Swinging Pendulum of Sentencing Reform: Political Actors Regulating District Court Discretion*, 24 BYU J. PUB. L. 1, 41 (2009).

121. In 2011, judges imposed non-government sponsored below-guideline sentences in 17.4 percent of cases. They imposed above-guideline sentences just 1.8 percent of the time. *See* U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Tbl. N (2011).

122. U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 112 (2011).

123. U.S. SENTENCING COMM'N, COCAINE AND FEDERAL SENTENCING POLICY Figure 2–4, at 19 (2007).

124. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

successful than those that attempt to avoid politics but end up aggravating the system's pathologically severe penalties.[125]

The Commission should repeatedly argue that mandatory minimum sentences are inflexible laws that undermine justice by preventing judges from fixing suitable punishments that take into consideration both the offense conduct and the individual defendant. Alternatively, the Commission should urge Congress to expand the statutory safety valve which, as currently constituted, allows defendants in some drug cases who meet certain criteria to escape mandatory sentences.[126] The problem is that the law applies only to a small percentage of defendants charged with offenses carrying mandatory minimums.[127] The law could easily be expanded to apply to cases other than those involving drugs and to defendants other than those with minimal records. The safety valve reflects a desire to allow sentencing flexibility for some offenders. Such flexibility should be more broadly available.

Finally, the Commission should promote legislation establishing a procedure by which elderly prisoners who present no danger to the public can be released. Corrections experts and criminologists generally agree that when prisoners reach age fifty, they fall into the elderly category.[128] The ACLU finds that "[t]he lack of appropriate healthcare and access to healthy living prior to incarceration, added to" the stress of prison life, "accelerates the aging process."[129] Between 13 and 14 percent of the federal prison population is presently over age fifty, and this population is increasingly comprised of individuals serving very long sentences who remain in prison in their old age.[130] Many of these prisoners would not pose a threat to public safety if they were released.[131] When Congress enacted the SRA and abolished parole, it eliminated the only effective mechanism by which older prisoners could obtain release. The Commission needs to convince Congress that it is time to create a new one.[132]

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125. *See* Barkow, *supra* note 51, at 813.

126. 18 U.S.C. § 3553(f) (2006).

127. U.S. SENTENCING COMM'N, *supra* note 122, at 113.

128. Joann B. Morton, *An Administrative Overview of the Older Inmate*, U.S. DEP'T OF JUSTICE NAT'L INST. OF CORR., 4 (1992), *available at* http://static.nicic.gov/Library/010937.pdf.

129. ACLU, *supra* note 22, at v.

130. *Id.* at v–vi.

131. *See* ACLU, *supra* note 22, at viii–ix.

132. Section 3582(c)(1) of Title 18 provides a means by which elderly prisoners can be released, but it requires a motion from Bureau of Prisons, which has adopted rules so restrictive that few prisoners ever qualify. To its credit, the Commission established a guideline, U.S. SENTENCING GUIDELINES MANUAL § 1B1.13, interpreting the statute more expansively. The BOP, however, has remained unmoved, adhering to its unduly narrow construction. *See* Cecilia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 510–12 (2010). The Commission could champion a new statutory proposal permitting early release not subject to the BOP's gate-keeping. I suggest that the Commission consider the early release proposals in the revised Model Penal Code. *See generally* Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second*

V. THE COMMISSION SHOULD RETHINK INTER-JUDGE DISPARITY AND REDUCE MASS INCARCERATION

I recognize that it will be very difficult for the Commission to change its mission as I have suggested. In order to respond to the problem of mass incarceration, the Commission will have to transcend its own history of creating harsh guidelines and continually increasing their severity. The Commission will also have to change its thinking about inter-judge sentencing disparity. I believe that the Commission should radically de-emphasize this issue but, to the extent that it remains a concern, the Commission needs to approach it more thoughtfully. Rather than analyzing why the number of below guideline sentences increases, the Commission sometimes responds in a knee jerk fashion, as it did when it asked Congress to enact legislation giving greater heft to the guidelines.

This issue emerged at the Commission's February 16, 2012 hearing. The Commission indicated that, in responding to the increase in below guideline sentences, its choices were to seek legislation that restored mandatory guidelines or that strengthened the advisory guidelines, and that it chose the latter alternative. Mary Price, counsel for Families Against Mandatory Minimums ("FAMM"), however, pointed out that there were other alternatives, and that the Commission should have examined the reasons for the below guideline sentences before making its "unprecedented request to Congress to stage . . . a legislative intervention."[133] She noted the Commission's "lack of curiosity . . . about the causes of variances and sources of disparity" and suggested that it explore "why judges believe the criminal history guideline so frequently fails to account for . . . the defendant's actual prior criminality."[134]

Price urged the Commission to go "behind the numbers . . ." to better account "for the role of prosecutors," and to use "the tools and authorities that you have . . . to improve troublesome sentencing rules . . . ."[135] She testified that the guidelines were "deeply flawed . . . riffed with sentences that are unduly long and severe, overly retributive not proportionate and based on little or no empirical evidence of their inherent validity" and that judicial variances were a "barometer and not a problem."[136] She asked the Commission:

> to dig down; refuse to the take the data at face value; embrace the feedback that you're getting; take stock of guidelines that are causing variances; account for the role of other actors and

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Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision, 42 U. TOL. L. REV. 859 (2011).

133. U.S. SENTENCING COMM'N, PUBLIC HEARING (2012) (testimony of Mary Price at 322, 323–24 (transcript on file with author)).

134. *Id.* at 326, 328.

135. *Id.* at 329–30, 332.

136. *Id.* at 333.

> other rules in this system that might be driving disparity; and, above all, don't do anything that's going to slow down or close down the ability to hear what the courts think about the rules that you write . . . but to go to Congress cold and say, this problem is so severe that now we need your help. I found it remarkable . . . – you started the ball rolling, but . . . [you] might have rolled it in the wrong direction . . . you presented a lot of raw data to Congress, but there wasn't a lot of analysis. So it doesn't help any of us understand, . . . what's really going on here.[137]

The questions that Price raised are profoundly important. Unfortunately, the Commission's response to Price's suggestions was less enthusiastic than one would have hoped. One commissioner defensively noted that the congressional subcommittee to which the Commission had presented its proposals had invited testimony from the Commission.[138] Another pointed out that the Commission had no authority over prosecutors but rather was tasked "with looking at the judicial branch," adding that the Commission believed "that there are outlier sentences and that all of us in this room can agree that there are outlier sentences."[139] Sadly, these comments indicate that the Commission continues to view its job as policing judges who impose overly lenient sentences. Policing lenient sentences, however, is not one of the Commission's statutory duties, nor will it lead to improved sentencing.[140]

If the Commission continues to be concerned about inter-judge disparity, it must make a better effort to understand it. This means listening to judges and treating below guideline sentences as critiques of the guidelines rather than as aberrant judicial conduct. The Commission should also examine recent studies relating to the issue. Legal scholars are increasingly skeptical that inter-judge disparity should be a matter of particular concern. For example, Professor Tiede, who recently completed a nationwide study of sentencing in federal drug trafficking cases, concluded that if judges are able "to exercise their discretion to fashion just sentences," any resulting disparity "should be seen as a positive."[141] This is so, Tiede determined, because district judges are more qualified than Congress, have a lot of sentencing experience, and will not necessarily abuse their discretion.[142] Tiede also concluded that variations in district caseloads and practices, including prosecutorial charging practices, are so pervasive that it is essential that judges have the discretion to tailor their sentencing practices in re-

137. *Id.* at 324–347.

138. *Id.* at 347 (comment of Vice-Chair Jackson).

139. *Id.* at 349, 352 (comments of Commissioner Friedrich).

140. *See* 28 U.S.C. § 994 (2006).

141. Tiede, *supra* note 120, at 41.

142. *Id.*

sponse.[143] Professor Shepherd, who also conducted a nationwide study of sentencing practices, found a connection between expanded discretion and a decrease in crime, concluding that "contrary to the expectations of many of the original tough-on-crime supporters, the reduced discretion under the guidelines is associated with *increases* in crime, not decreases."[144]

If, as I urge, the Commission decides to focus on reducing mass incarceration and pay less attention to inter-judge sentencing disparity, it will no doubt be subject to criticism, including criticism from conservatives in the House of Representatives. But if the Commission wishes to be relevant to the sentencing problems of today, it will have no alternative but to push back. Most students of crime and punishment agree that mass incarceration is the most serious criminal justice problem that we presently face. And yet, because crime is such a sensitive political issue, few, if any, elected officials are willing to talk about it, much less propose legislation to change it. The Commission is ideally suited to address the issue. It is well-staffed and need not worry about politics. In order to be effective, however, the Commission must approach its job in a way that it has not done before. It must become both more enlightened and more assertive. It must take major steps to reduce the federal prison population, and it must also make clear to Congress that inter-judge sentencing disparity is far from the most serious sentencing issue we face. To the extent that it is a problem, the most effective way to address it is to reduce the severity of the guidelines so that they are in greater conformity with the reasoned opinion of judges and jurors.

143. *Id.* at 42.

144. Joanna Shepherd, Blakely's *Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 535 (2007).